

## A Short Meditation on Some Remaining Issues in Evidence Law

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I was pleased when Professor D. Michael Risinger invited me to offer some short comments on the Articles published in the last issue and more pleased yet when I read the fine essays. They address with rare penetration some of the key issues in the American Law of Evidence. These remarks serve mainly to underscore the centrality of the topics addressed and raise a number of additional questions.

Professor Risinger's programmatic introduction to the issue refers to his attempt to focus "the inquiry on some . . . broader questions of enduring *mystery*."<sup>1</sup> The latter term rarely occurs in discussions among the hard-headed logicians who often engage in discussions of the law of evidence, but I think it is apt. Specific issues in evidence law necessarily arise against a background of issues that do pose mysteries to be lived through, not merely problems to be solved. The nature of human judgment in practical matters, even when competent, is "mysterious."<sup>2</sup> Evidence law inevitably reflects a practical resolution of tensions created by incommensurable values. Its structure both reflects and creates the political and legal culture, the "forms of life," that are partially beyond scientific grasp.<sup>3</sup> It assigns authority to judges or juries based on the elusive, if not mysterious, distinction between fact and law. Its structure necessarily, though implicitly, takes a stand on the constitutional status of the jury<sup>4</sup> and the range of jury authority over the norms for trial decision-making, the extent to which the jury remains "judges of the law" in the interstices of legal rules. Because it is *law*, its generality is always

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<sup>1</sup> D. Michael Risinger, *Guilt v. Guiltiness: Are the Right Rules for Trying Factual Innocence Inevitably the Wrong Rules for Trying Culpability*, 38 SETON HALL L. REV. 885, 886 (2008) (emphasis added).

<sup>2</sup> PETER STEINBERGER, *THE CONCEPT OF POLITICAL JUDGMENT* 222 (1993).

<sup>3</sup> See HANNA PITKIN, *WITTGENSTEIN AND JUSTICE* 316–25 (1972).

<sup>4</sup> AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 83, 96 (1998) (on the absolute centrality of the jury to the vision animating all of the Bill of Rights).

in tension with the trial forum, the place where the “booming, buzzing confusion” of the world of particulars talks back to the “law of rules.” Its generality serves a first principle of procedural justice—that similar cases be similarly decided—but always threatens to exclude the details that show the uniqueness, the *dissimilarity*, of the case being tried. And, as several of our authors point out, the doctrinal structure of exclusionary rules may be in tension with the inevitably narrative structure of any understanding of human acts. Any attempt to mitigate evidence law’s generality by providing the judge discretion and insulating him or her from effective appellate review, as we do, invites all the arbitrariness that any “law of rules,”—including procedural law of rules, such as evidence law—is designed to protect against. By limiting the evidence that a party may present at trial, evidence law always threatens that other first principle of procedural justice: *audiatur et altera pars* (let the other side be heard).<sup>5</sup>

This all does not mean that there cannot be better or worse resolutions to particular doctrinal questions that arise within evidence law, or that some of those questions are *relatively* detached from these deeper and more “mysterious” background issues. But it does suggest that much more is afoot than a purely technical or logical discussion may evoke. These issues are always in the background and involve issues that are “essentially contested,” incapable of anything other than provisional resolution.

Professor Risinger asks the important question of whether different sorts of evidence are appropriate for resolving the very different sorts of questions that we ask jurors to resolve at trial, from questions of “brutally elementary facts,” such as the identity of a perpetrator of a crime, to much more interpretive and evaluative questions, such as issues surrounding states of mind and the “reasonableness” of past action.<sup>6</sup> He then wonders whether the law of evidence should accommodate this range of issues or whether “by the time the trial starts [it is] already too late, given the potential for the distortion of information that is inevitably a part of a system run largely by partisan adversaries[.]”<sup>7</sup> He then offers a series of tentative conclusions about a series of interrelated issues. For my part, I believe that the serious limitations of the adversary criminal trial on

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<sup>5</sup> STUART HAMPSHIRE, JUSTICE IS CONFLICT 9–17 (2001). Hampshire quotes the adage in the imperative mood, *audi alteram partem*. *Id.* at 11. Several of the authors discussed in this essay find this principle embedded at an elevated level for criminal defendants in the Fifth and Sixth Amendments to the U.S. Constitution.

<sup>6</sup> I provided a taxonomy of those issues in ROBERT P. BURNS, A THEORY OF THE TRIAL 185–201 (1999).

<sup>7</sup> Risinger, *supra* note 1, at 888.

matters of “brutally elementary fact,” such as the identity of the perpetrator of a violent crime, are in fact the results of serious problems of the market and bureaucratic systems within which the trial is embedded. Maldistribution of legal resources, police misconduct, or inadequate investigatory methods may skew results. Thus, further reforms in the law of evidence, except further liberalization of rules controlling lay witness testimony, have a very limited role to play in improving the accuracy of trial decision-making. I have come to the same conclusions as Professor Risinger on almost all the specific points he enumerated. Except with regard to expert testimony, I am, as Professor Eleanor Swift recognizes,<sup>8</sup> a strong proponent of the trend toward admissibility that we have seen for the last forty years and certainly an opponent of engrafting generalized refinements on existing rules. Thus, I would not share Professor Risinger’s suspicion of free proof, if he means that suspicion to be general. Because the applications of exclusionary rules are invariably categorical and always rob the jury of all the probative value that the excluded evidence has, I would invoke them only if we are convinced that the powerful critical devices of the adversary trial are inadequate to appropriately weigh the evidence.

It seems to me that, as Professor Keith A. Findley suggested<sup>9</sup>, this may be true more for categories of *evidence* than for categories of *issues*. And the invocation of exclusionary rules should be made with a respect for the constitutional status of the jury so that determinations of materiality in particular should be quite liberal. The important points that Professor Swift makes about the centrality of narrative structure to the trial<sup>10</sup> provides additional arguments in favor of a liberalized law of evidence: a single additional detail, and certainly a constellation of additional details, can substantially change the significance of the stories told at trial. And exclusion of all evidence on a question that the jury “naturally” asks does not take the question off the table. It simply invites the jury to “finish the story” based on its own, often groundless, speculation.<sup>11</sup> And so I would take Professor Risinger’s suspicion of “transcontextuality” of evidence rules to its logical conclusion: a suspicion of an additional set of intermediate rules that generally identify context. Better that there be as few ex-

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<sup>8</sup> Eleanor Swift, *Narrative Theory, FRE 803(3), and Criminal Defendants’ Post-Crime State of Mind Hearsay*, 38 SETON HALL L. REV. 975, 989, 1004 (2008).

<sup>9</sup> Keith A. Findley, *Innocents at Risk: Adversary Imbalance, Forensic Science, and the Search for Truth*, 38 SETON HALL L. REV. 893 (2008).

<sup>10</sup> Swift, *supra* note 8.

<sup>11</sup> Shari Seidman Diamond & Neil Vidmar, *Jury Room Ruminations on Forbidden Topics*, 87 VA. L. REV. 1857 (2001).

clusionary rules as possible. The only other alternative is to invest even more discretion in the trial judge to identify context in a manner effectively unbound by rules. And *that* raises the background issues about both the role of the jury and the constitutionally based right of defendants to present their defenses.

Finally, putting aside the special case of scientific evidence, I am not sure whether we can effectively separate the normative issues from the issues of brutally elementary fact in large range of cases. It is true that in some criminal cases the central issue is identity; but even here there are often issues of the credibility of witnesses, the plausibility of alternative defense factual theories, and the reliability of confessions that must be evaluated contextually through the construction and evaluation of narratives. The great strength of the trial is its insistence on the importance of the most specific factual details to these contextual judgments. Otherwise, the case is likely to be decided on over-generalized stereotypes. That is why even I would retain the requirement that testimony be in the language of perception, wherever possible, and with full foundation as to personal knowledge. Conversely, much of the evidence presented at trial is likely to have “two faces,” as trial lawyers like to say. Even the determination of what that evidence *is*, not to say what it *means*, is inevitably bound up in circular forms of reasoning where the whole (the more plausible narrative) determines the part (the nature and meaning of particular perceptual judgments) and the parts the whole.<sup>12</sup> So factual accuracy is crucial for deft normative judgments. But deft normative judgments—about credibility and the reliability of confessions, for example—may be crucial for determinations of brutally elementary fact. Yes, there is a continuum, but I am not sure whether we can identify rules that say when we should apply a different set of rules.

Professor Findley’s fine Article identifies the investigative, doctrinal, and evidentiary realities that disadvantage defendants, especially fully innocent defendants, and, he argues persuasively, often overwhelm the “advantages” that come from the privilege against self-incrimination and the stated burden of proof.<sup>13</sup> I will not try to summarize his argument. There is one important question that his Article raises. It echoes Professor Risinger’s concern about the practical possibility of reform.<sup>14</sup> It is clear that the formal qualities of the

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<sup>12</sup> Robert P. Burns, *The Distinctiveness of Trial Narrative*, in 1 *THE TRIAL ON TRIAL: TRUTH AND DUE PROCESS*, 157, 167–69 (Antony Duff et al. eds., 2000).

<sup>13</sup> Findley, *supra* note 9.

<sup>14</sup> Risinger, *supra* note 1, at 888.

criminal trial, including the terms of the law of evidence, play only a part in the criminal justice “system.” The operation of markets and bureaucracies, which function on principles quite remote from those that structure the trial’s “due process” model<sup>15</sup> are, as Professor Findley demonstrates in a range of contexts, even more important in establishing the form of criminal justice we concretely have. The fear is that whatever reforms we may be able to achieve in the trial’s formal structure will quickly be counterbalanced by adjustments in the systems world within which that structure occurs.<sup>16</sup> Taken to an extreme, such a deterministic perspective, which envisions a kind of cast-iron equilibrium, would paralyze any attempt at reform.

But assume for a moment, as I think we have to, *both* that there is some mutual causality between formal structures and the systems within which they are embedded, *and* that we have (at least abstractly) some ability actually to shape that balance in our “spaces of freedom,” such as legislatures and appellate courts.<sup>17</sup> *Where and how* could a discussion take place where there might be a rational rebalancing of formal rules and the behaviors of markets and bureaucracies? Effective law enforcement is an important goal; it is supported by powerful bureaucratic incentives to “clear cases” and political incentives to gain convictions, and is passionately embraced by many police officers and prosecutors who see first-hand the effects of violent crime. Writers sympathetic to the importance of truth at trial tend to attribute excesses of partisanship on the part of police and prosecution to the perceived excess of partisanship by defense counsel and the perceived overreaching of legal formalisms, including the rules of evidence and constitutional principles of criminal procedure that sacrifice accuracy in order to control the police.<sup>18</sup> Prosecutors and defense counsel tend to be partisans even in the political discussions about the framework within which their case-by-case partisanship should go forward. Appellate courts will rarely consider more than one issue of evidence law or criminal procedure at a time. Pro-

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<sup>15</sup> Herbert L. Packer, *Two Models of the Criminal Process*, 113 U. PENN. L. REV. 1, 13–15 (1964).

<sup>16</sup> See, e.g., GEORGE FISHER, *PLEA BARGAINING’S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA* (2003).

<sup>17</sup> Of course, these institutions may be understood as objects of social-scientific inquiry that may employ at least a methodologically driven determinism, but that does not imply the absence of real political freedom in those forums.

<sup>18</sup> See, e.g., WILLIAM T. PIZZI, *TRIALS WITHOUT TRUTH: WHY OUR SYSTEM OF CRIMINAL TRIALS HAS BECOME AN EXPENSIVE FAILURE AND WHAT WE NEED TO DO TO REBUILD IT* (1999); see also MARVIN FRANKEL, *PARTISAN JUSTICE* (1978) (criticizing the absolute formal protections on the defendant’s privilege against self-incrimination at trial and the bureaucratic erosion of the privilege through police practices).

fessor Findley's Article raises this question: assuming that the balance among formal and informal practices has become skewed and that appellate courts are not well placed to reset that balance, *how and where* could real deliberation, not merely partisan wrangling, about reforms take place?

Professor Swift's Article justly criticizes federal courts' accretions to the hearsay rule and is generally sympathetic to my skepticism that exclusionary rules foster accuracy at trial.<sup>19</sup> She does, however, express a concern about "information overload" if the jury trial moves in the direction of a free proof regime.<sup>20</sup> I, however, believe that this concern is best addressed by "macromanaging," not "micromanaging," the trial. The adversary system itself provides strong incentives to partisan lawyers to present evidence that has probative value. The critical devices of the trial provide methods far more powerful and flexible for undermining the claimed probative value of any tendered evidence. The necessary concessions to the shortness of life that must be made in the trial are, it seems to me, better made by time limitations imposed on parties who still maintain a large measure of control over the details of the evidence they choose to present. As Professor Swift notes, I would maintain "some concept of materiality"<sup>21</sup> as a concession to the law of rules<sup>22</sup> at trial. But there are two reasons why materiality should be applied quite liberally. The first is the constitutional status of the jury trial as a device for quite self-consciously drawing into the legal system perspectives discontinuous with those dominant among judges.<sup>23</sup> The second is the price that is paid in the intelligibility—and so truth—of determinations of inevitably narrative accounts of human actions at trial by the mechanical application of inevitably over-generalized exclusionary rules.

One partial exception to all of this is scientific evidence, the focus of Professors Christopher Slobogin<sup>24</sup> and Edward J. Imwinkelried<sup>25</sup> and, to some extent, Professor Findley as well. Our present

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<sup>19</sup> Swift, *supra* note 8.

<sup>20</sup> *Id.* at 1006.

<sup>21</sup> *Id.* at 1004 (quoting Robert P. Burns, *Fallacies on Fallacies: A Reply*, 2 INT'L COMMENT. EVID. (2006)).

<sup>22</sup> Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

<sup>23</sup> See, e.g., AMAR, *supra* note 4; Charles Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639 (1973).

<sup>24</sup> Christopher Slobogin, *Experts, Mental States, and Acts*, 38 SETON HALL L. REV. 1009 (2008).

<sup>25</sup> Edward J. Imwinkelried, *The Case Against Abandoning the Search for Substantive Accuracy*, 38 SETON HALL L. REV. 1031 (2008).

situation is simply chaotic, with generalist judges making virtually un-reviewable “discretionary” determinations by consulting a list of over a dozen unsystematized “factors,” many of which do not apply at all to some forms of expert testimony. What order can be found in this chaos seems based more on routine and outcome rather than the quality of the evidence. As these scholars demonstrate, evaluating at least some expert evidence is indeed one of those areas where the devices of the trial are often unable to overcome the bureaucratic and market constraints that surround it. And so the concrete suggestions they make for improving the quality of scientific evidence, especially forensic evidence, should be aggressively explored. It seems to me our current lot would be improved by *either* higher levels of centralized quality control *or* less authority on the part of trial judges to admit forms of forensic evidence while excluding more reliable forms of social scientific evidence. The latter may be a second-best practicality possible until the former is actually achieved.

I want to end by congratulating Professor Risinger for bringing together scholars who have given us Articles of the highest quality that embody the continued revitalization of evidence scholarship and that identify important goals of practical reform. Now, if we can just figure out how to get there from here.